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No._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GREGORY HOUSTON

PETITIONER

VS.

DALE FOLTZ, Warden, State Prison
of Southern Michigan, at Jackson,

RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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34 pp

QUESTIONS PRESENTED

I-II. WHERE PETITIONER CLAIMED SELF-DEFENSE, DID THE TRIAL COURT ERR IN EXCLUDING NONADMISSIBLE HEARSAY FROM AN UNKNOWN DECLARANT?

The District Court said	"No"
Petitioner-Appellant says	"Yes"
Respondent-Appellee says	"No"
The Sixth Circuit Court of Appeals said	"No"

III. WAS PETITIONER DENIED DUE PROCESS OF LAW WHERE CERTAIN PRETRIAL STATEMENTS OF A PROSECUTION WITNESS WERE NOT GIVEN HIS COUNSEL UNTIL DURING TRIAL, THE STATEMENTS DID NOT CONCERN THE GUILT OR INNOCENCE OF PETITIONER, NO OBJECTION WAS MADE TO THE PROCEDURE IN THE STATE COURT, AND A CODEFENDANT WHO TIMELY RAISED THE ISSUE RECEIVED A NEW TRIAL UPON APPEAL TO THE STATE COURT?

The District Court said	"No"
Petitioner-Appellant says	"Yes"
Respondent-Appellee says	"No"
The Sixth Circuit Court of Appeals said	"No"

IV. WAS PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY DID NOT MAKE A PRETRIAL MOTION TO SUPPRESS PETITIONER'S PRIOR CONVICTIONS, YET ANALYSIS OF THE CONVICTIONS SHOWS MOST WOULD HAVE BEEN ADMISSIBLE, AND PETITIONER HAD NOT COMPLIED WITH THE STATE'S PROCEDURAL RULES REGARDING THE ISSUE OF INEFFEC- TIVE ASSISTANCE OF COUNSEL UNTIL EIGHT YEARS AFTER HIS CONVICTION?

The District Court said	"No"
Petitioner-Appellant says	"Yes"
Respondent-Appellee says	"No"
The Sixth Circuit Court of Appeals said	"No"

TABLE OF CONTENTS

QUESTIONS PRESENTED.....1-3

INDEX OF AUTHORITIES.....6-7

STATEMENT OF THE CASE

A. Statement of Proceedings...8-12

B. Statement of Facts.....12-15

REASONS FOR DENYING THE WRIT

I-II. WHERE PETITIONER CLAIMED SELF-DEFENSE, THE TRIAL COURT DID NOT ERR IN EXCLUDING NONADMISSIBLE HEARSAY WHERE THE DECLARANT WAS UNKNOWN AND OTHER COMPETENT EVIDENCE ESTABLISHED PETITIONER'S GUILT.....16-21

TABLE OF CONTENTS cont'd.

III. DUE PROCESS WAS NOT DENIED PETITIONER WHERE THE STATEMENT AT ISSUE WAS GIVEN COUNSEL DURING TRIAL, NO OBJECTION WAS MADE AT TRIAL, THE STATEMENT DID NOT CONCERN THE GUILT OR INNOCENCE OF PETITIONER, AND THE ISSUE AS NOT RAISED IN A TIMELY MANNER.....22-27

IV. PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE HE DID NOT MAKE A MOTION TO SUPPRESS PRIOR CONVICTIONS, BUT CONCLUDED THAT TWO OF THE THREE PRIORS WOULD HAVE BEEN ADMISSIBLE, AND PETITIONER DID NOT COMPLY WITH THE STATE PROCEDURAL RULE ON THE ISSUE.....28-32

RELIEF.....33

INDEX OF AUTHORITIES

CASES **PAGE**

Chandler v Jones,
813 F2d 773 (6th Cir. 1987).....32

Cooper v Sowders,
837 F2d 284, 286 (6th Cir. 1988).....21

Davis v Jabe,
824 F2d 483 (6th Cir. 1987).....20

Elmore v Foltz,
768 F2d 773 (6th Cir. 1985).....24

Fuson v Jago,
773 F2d 55, 59 (6th Cir. 1985).....20

Maupin v Smith,
785 F2d 135, 138
(6th Cir. 1986).....31, 32

Moore v Zant,
734 F2d 585 (11th Cir. 1984).....18
Palmes v Dugger,
596 F Supp 1433 (M.D. Fla. 1984).....19
People v Brady,
139 Mich App 688; 691-693; 363
NW2d 8 (1984) 30

People v Garcia,
398 Mich 250; 247 NW2d 547 (1976)....32

People v Ginther,
390 Mich 436; 212 NW2d 922
(1973).....29,30

People v Mobley,
390 Mich 57; 210
NW2d 327 (1973).....22

CASES CONTINUED PAGE

People v Pauli,
138 Mich App 530, 533-534; 361
NW2d 359 (1984) 30

People v Roberson,
55 Mich App 413; 416-417; 222
NW2d 761 (1974) 23

Strickland v Washington,
466 US 668, 104 S Ct 2052, 80
L Ed2d 674 (1984) 32

United States v Valuenzuela-Bernal,
458 US 858, 102 S Ct 3440, 73
L Ed2d 1193 (1982).....25, 26

United States v Yelardy,
567 F2d 863 (6th Cir., 1978) 11

Wainwright v Sykes,
433 US 72, 97 S Ct 2497, 53
L Ed2d 594 (1977) 31

Walker v Engle,
703 F2d 959, 962 (6th Cir. 1983),
cert. den, 464 US 951.....21

Witt v Wainwright,
755 F2d 1396 (11th Cir. 1985) 19

Woodard v Hutchins,
464 US 377, 104 S Ct 752, 78
L Ed2d 541 (1984) 19

STATUTES AND OTHER AUTHORITIES

MCL 768.29; MSA 28.1052 24

MCL 769.26; MSA 28.1096 24

MRE 803(2) 16

STATEMENT OF THE CASE

A. STATEMENT OF PROCEEDINGS

Respondent-Appellee accepts the statement of proceedings given by Petitioner-Appellant, but would add the following to aid the Court:

Petitioner was charged along with codefendant King in the murder of Kevin White, and was charged with codefendants Lewis and Gavin in the assault on Terrence Silver.

Petitioner's appeal of right to the Michigan Court of Appeals raised the following issues: a) error of the trial court in denying a motion for directed verdict re: evidence of premeditation; b) denial of a fair trial because of comments made by the assistant prosecuting attorney during rebuttal.

The Michigan Court of Appeals allowed Petitioner to file a supplemental brief, through different counsel, and five issues were raised: a) insufficient evidence on the element of intent to kill, b) erroneous self-defense instruction, c) erroneous instruction as to Petitioner not testifying, d) insufficient evidence on intent to kill element in charge of assault with intent to murder, e) failure of trial counsel to object to erroneous instructions.

Although unpublished, the Michigan Court of Appeals opinion affirming Petitioner's convictions addressed each issue raised by Petitioner, and denied merit to them. By order dated May 19, 1981, Petitioner's application for leave to appeal to the Michigan Supreme Court was denied.

In August, 1981, Petitioner, through counsel, filed a petition for writ of habeas corpus in District Court. It was given the number 81-72872, and was denied by memorandum opinion and order dated June 1, 1982, authored by United States District Court Judge Philip Pratt. Six issues were raised in that petition: the instructional issues were first analyzed pursuant to the cause and prejudice standard, and were examined on the merits because the state Court of Appeals had looked beyond the fact that no objection had been made at trial. The claim of ineffective assistance of counsel was examined by Judge Pratt's opinion in the following perspective: "...A district court presented with a claim of ineffective assistance is required to review the full trial record and evaluate the 'total picture' rather than simply focus on particular errors or omissions

by counsel." United States v Yelardy, 567 F2d 863, 865 (6th Cir., 1978)." (Page 13 of Judge Pratt's memorandum opinion.) The last issue as to improper prosecutorial remarks in rebuttal was also denied merit. There was no mention in either the petition or the opinion of the reversal of the conviction of a codefendant by the state Court of Appeals in a published opinion, 98 Mich App 146 (1980) even though that case had been in existence for almost two years, having been issued on June 16, 1980.

Next, Petitioner filed, through new counsel, a Motion for Leave to File Motion for New Trial, in June, 1984, two years after the habeas petition was denied. That pleading asked the successor judge to consider the issues raised in this appeal. The trial court, however, by order entered in August, 1984, denied the motion for leave to file

motion for new trial, and thus, did not consider the merits of any of the claims raised in the pleading. (This point was made by Respondent in the response to the petition for writ of habeas corpus in District Court, and in the state courts after Petitioner appealed from the order denying leave to file delayed motion for new trial.)

By way of memorandum opinion and order denying the petition for writ of habeas corpus, District Court Judge Pratt addressed the issues raised now, and found them not sufficient to warrant habeas relief. (See opinion and order, appendix.)

B. STATEMENT OF FACTS

On the night of May 14-15, 1976, Terrence Silver and Vincent Hollis had a

disagreement regarding Hollis' girlfriend. Hollis threatened Silver and Silver hit Hollis (235-236).

On May 16, 1976, at 1:00 a.m., Silver was walking to a store in Detroit with Curtis (Duane) Sheppard, Cheryl Holloway (222), and two dogs. They were confronted by Gregory Houston, Eddie Gavin and Raleigh Lewis. Gavin asked Silver why he had hit Hollis; a short discussion followed. Holloway went to get Silver's brother and Houston began flashing a knife. Kevin White (Silver's brother) arrived and everything cooled down (231-232).

Silver, Sheppard, Holloway, White, and the dogs continued toward the store (232). When this group was about half-way into the next block, Houston, Gavin, and Lewis, plus Michael King (Hollis' brother) and Hollis came running

up to them (233-234). King had a shotgun (237).

Gavin indicated that Houston wanted to talk to White (234), apparently about a prior argument between Houston and White (236). King held the shotgun on Silver while Houston and White crossed the street. After an unknown conversation, Houston (with a knife) and White (with a brick) separated. Then Houston approached White and Silver's dogs attacked Houston (237). At King's orders, Silver called off the dogs (240-241). Houston again approached White and attempted to stab him, eventually succeeding (241). White started to run away and said he would be back but died shortly afterward (241-243).

Houston then returned to Silver and Silver asked Houston why he had stabbed

White (Silver's brother) (244). Houston indicated that he had planned to kill White for some time (244).

Detroit police officer Kelly testified that he was "flagged down" by a woman as he was driving down East Jefferson. (686). Outside the presence of the jury, he explained that the woman said that a man had been stabbed and that his attacker was running "north on Concord". (692-693). Kelly followed the man and arrested him. It was codefendant Eddie Gavin (who was later charged with assault with intent to kill Terrence Silver). Gavin was not charged in the murder of Kevin White. The trial court refused to admit the statement of the woman-bystander, elicited through the officer, because it was hearsay.

REASONS FOR DENYING THE WRIT

I-II. WHERE PETITIONER CLAIMED SELF-DEFENSE, THE TRIAL COURT DID NOT ERR IN EXCLUDING NONADMISSIBLE HEARSAY WHERE THE DECLARANT WAS UNKNOWN AND OTHER COMPETENT EVIDENCE ESTABLISHED PETITIONER'S GUILT.

No error occurred when the trial court would not allow a police officer to testify what an unknown witness said near the crime scene. (Petitioner's I.) Certainly in order to have that testimony admitted at trial, an exception to the hearsay rule would have to apply. Petitioner claims it was an excited utterance (res gestae statement).

MRE (Michigan Rule of Evidence) 803(2), in effect <u>after</u> this trial, defines excited utterance:

> "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

From the transcript excerpt presented by Petitioner, it seems the witness' statement was not an excited utterance: although there may have been a startling event (a stabbing), the statement gives no clue as to whether the woman saw it or when it happened. Because much other evidence confirmed that many people were involved, the woman's statement about one person is very suspect as to time.

The State cases cited by Petitioner do not exactly support his position. Todaro held, in relevant part, that no miscarriage of justice occurred when a police officer gave an unresponsive answer which included the comment of an unknown person "that is one of them"

(meaning defendant), and that statement was admitted at trial over objection, was not stricken, and was not the subject of a cautionary instruction.

There was no discussion in Todaro about spontaneous declaration or excited utterance re: that statement, although from the factual context presented, it was clearly an excited utterance.

As for the Johnson case, another proper example of an excited utterance was shown. A startling occasion - two men running down the street, statements given minutes after the event, and the statements related to the occurrence.

Because not enough evidence corroborated the needed foundation for an excited utterance herein, the trial court was within his discretion in keeping out that testimony.

It should be presumed that Petitioner was aware of this point at trial, since counsel made an issue of it and thus preserved it. Yet, as explained earlier, it was never raised until the very delayed motion in 1984, and then it was not addressed on the merits. Nonexcusable negligence exists on the record to support the Respondent's position. The issue should have been raised in the appeal of right in the state system, and in the first habeas petition in 1982. Failure to do so constitutes inexcusable neglect and intentional abandonment. See Moore v Zant, 734 F2d 585 (11th Cir. 1984); Witt v Wainwright, 755 F2d 1396 (11th Cir. 1985); Palmes v Dugger, 596 F supp 1433 (M.D. Fla. 1984); and see Woodard v Hutchins, 464 US 377, 104 S Ct 752, 78 L Ed2d 541 (1984).

Additionally, the statement at issue only concerned the witness's version of something defendant Gavin had done, and he was only charged with the assault on Silver, not the murder of White. Because there was not enough foundation shown to establish that the statement was an excited utterance, under states rules of evidence, the trial court did not err in excluding it. Further, there was other evidence which substantiated the charges against Petitioner. (Compare with Davis v Jabe, 824 F2d 483 (6th Cir. 1987), where harmless error was found in the exclusion of proffered testimony of the accused's brother.)

Lastly, as held by the District Court and the Sixth Circuit Court of Appeals "habeas review does not ordinarily extend to state court rulings on the admissibility of evidence". Fuson v Jago, 773 F2d 55, 59 (6th Cir. 1985),

cert. den, 106 S Ct 3334 (1986). Since there was no error of constitutional magnitude in the exclusion of the proffered evidence, (see page 4 of Sixth Circuit opinion), the state court's decision was a proper exercise of his discretion. See Cooper v Sowders, 837 F2d 284, 286 (6th Cir. 1988); Walker v Engle, 703 F2d 959, 962 (6th Cir. 1983), cert. den, 464 US 951.

III. DUE PROCESS WAS NOT DENIED PETITIONER WHERE THE STATEMENT AT ISSUE WAS GIVEN COUNSEL DURING TRIAL, NO OBJECTION WAS MADE AT TRIAL, THE STATEMENT DID NOT CONCERN THE GUILT OR INNOCENCE OF PETITIONER, AND THE ISSUE WAS NOT RAISED IN A TIMELY MANNER.

The discovery order issue, upon which reversal was predicated in King, (the codefendant), was never raised by this Petitioner until four years after the King case was published. This obvious delayed bootstrapping should not be condoned. Given that the same panel heard all appeals at the same time, they did not see fit to apply the "discovery order" issue to Petitioner Houston. This Court should also deny merit to the point.

Another analysis exists which supports a denial of merit for the issue. Because Petitioner presented a defense of self-defense, the discovery problem would not have altered his defense. That is, the jury would not have believed his defense more had the withheld statement been utilized. Thus, no reversible error occurred to Petitioner Houston. If error at all, it was harmless. People v Roberson, 55 Mich App 413, 416-417; 222 NW2d 761 (1974); People v Mobley, 390 Mich 57; 210 NW2d 327 (1973).

Next, Petitioner argues due process in requesting a new trial based on the King case. Due process generally means following a procedure to reap the benefits of the system which designed the procedure. No procedure was used by Petitioner here to get the benefit of a new trial except to wait four years after King was published. If the doctrine of

laches could be applied to criminal matters, this would be a prime example. Waiver of the issue also must be considered, since the issue existed at the time of trial and has not been raised until 1984.

Having held that a state rule of evidence, and the interpretation thereof, required exclusion of the requested testimony, the trial court properly exercised his discretion and control of the trial proceedings, in accordande with state law. MCL 768.29; MSA 28.1052; MCL 769.26; MSA 28.1096.

This was not like the situation in Elmore v Foltz, 768 F2d 773 (6th Cir. 1985) where certain tapes of conversation between the accused and an informant were destroyed, yet this Court found no denial of due process of law, given the factual context of the matter. In reaching that

conclusion, the Court pointed out that the material examined must be material and favorable to the accused before any colorable claim of error can be found. Here, the statement of witness Silver only went to impeachment of what he had said at the preliminary hearing about the presence of another person. It did not concern itself with the guilt of Defendant- Petitioner in the crimes charged. And it was not material to the self-defense theory presented by Petitioner.

As the United States Supreme Court stated in United States v Valuenzuela-Bernal, 458 US 858, 102 S Ct 3440, 73 L Ed2d 1193 (1982), when speaking to the notion of denial of due process of law:

> Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. 73 L Ed2d at 1205.

Even though the statement at issue here was not disclosed to Petitioner before trial, there can not be a claim of denial of due process now where the record shows that the statement was given counsel during trial, no objection to the issue was made, the statement did not inculpate or exculpate Petitioner, and it was not briefed until eight years after conviction. The act complained of did not "necessarily prevent a fair trial". United States v Valenzuela-Bernal, supra.

As the Sixth Circuit opinion recognized, concerning an issue like this, "the test is whether the concept of fundamental fairness was violated". (Opinion, page 5.) It was not.

IV. PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE HE DID NOT MAKE A MOTION TO SUPPRESS PRIOR CONVICTIONS, BUT CONCLUDED THAT TWO OF THE THREE PRIORS WOULD HAVE BEEN ADMISSIBLE, AND PETITIONER DID NOT COMPLY WITH THE STATE PROCEDURAL RULE ON THE ISSUE.

Petitioner's ultimate issue, one which appears too frequently in state appellate matters, claiming that trial counsel was ineffective in his representation since he failed to make a motion to suppress prior convictions, does not deserve review for several reasons: established state procedure on the issue requires a timely raising of the point, accompanied by a request for an evidentiary hearing, should the record

be deficient to support the claimed error; counsel correctly determined that most likely two of Petitioner's three prior convictions would be admissible (according to his affidavit filed post-conviction); and the point has not been presented for review on the merits to the state appellate courts, since the trial court, in 1984, denied the application for leave to file delayed motion for new trial and did not examine this issue, nor did the appellate courts. (See arguments, supra.)

With the case of People v Ginther, 390 Mich 436; 212 NW2d 922 (1973), the Michigan Supreme Court set forth the required procedure for those appellants who desire to perfect a claim of error from the issue of ineffective assistance of counsel, where the lower court record is deficient. The appealing party must seek an evidentiary hearing at the trial

court level to support the claim of ineffective assistance of counsel. Ginther, supra. The testimonial record in the lower court must exclude reasonable hypotheses consistent with adequate representation. Ginther, supra.

Concurrent with that requirement is the caveat dealt with earlier that the issue must be raised in a timely manner, and not casually brought forth years later for possible resolution. The doctrine of finality, wherein nonjurisdictional issues must be raised properly, People v Pauli, 138 Mich App 530, 533-534; 361 NW2d 359 (1984), and People v Brady, 139 Mich App 688, 691-693; 363 NW2d 8 (1984) controls. A claim of ineffective assistance of counsel is not a jurisdictional defect, and the record here shows that Petitioner recognized that by raising that claim (as

to other instances of conduct) in his 1982 petition for writ of habeas corpus. That he waited until 1984 to raise the current attack supports Respondent's position that the point should be considered waived. Habeas relief should be denied simply because of this procedural default. Wainwright v Sykes, 423 US 72, 97 S Ct 2497, 53 L Ed2d 594 (1977), and Maupin v Smith, 785 F2d 135, 138 (6th Cir. 1986).

Secondly, as Judge Pratt correctly noted, trial counsel was "essentially correct in his assessment to the extent that two of Petitioner's three prior convictions could have been used at trial". (See District Court opinion.) He did not act outside the realm of reasonable and competent trial strategy in representing Petitioner as he did; nor did he commit a serious mistake which can now be said to have affected the probable

outcome of the trial. Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed2d 674 (1984); People v Garcia, 398 Mich 250; 247 NW2d 547 (1976).

Finally, as analyzed in I. supra, there never was a review on the merits of this issue in the Michigan courts such that this Court should grant habeas review. Procedurally, Petitioner has double faulted, and, since this is not a tennis match, he gets no further serves. Maupin, supra. (Compare with the situation in Chandler v Jones, 813 F2d 773 (6th Cir. 1987) where this Court held Petitioner failed to show how counsel's deficient performance prejudiced the defense, even though specific deficiencies were found.)

RELIEF

WHEREFORE, Respondent requests this Court to deny the petition for writ of certiorari.

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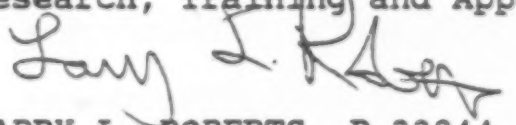

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